IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-10-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE K. MOHAN RAM

O.S.A.NO.413 OF 2000
and
Cross Objection No.108 of 2001

O.S.A.NO.413 OF 2000

1. Amudha Rani
2. Vijayalakshmi
3. Shanthi @ Ramaprabha .. Appellants

Vs.

1. K. Veeraraghavan @ K.V.Raghavan
2. V. Karunamurthy
3. v. Narayanan
4. V. Damodaran
5. V. Arumugam .. Respondents

Cross Objection No.108 of 2001

1. V. Karunamurthy
2. v. Narayanan
3. V. Damodaran
4. V. Arumugam .. Cross Objectors

Vs.

1. Amudha Rani
2. Vijayalakshmi
3. Shanthi @ Ramaprabha .. Respondents

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Appeal and Cross Objection have been filed under Clause 15 of the Letters Patent and Order 36 Rule 2 of O.S. Rules read with Order 41 Rule 22 CPC against the Judgment of the learned single Judge in C.S.No.363 of 1995 dated 5.6.2000.

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For Appellants in OSA and Respondents in Cross Objection : Mr.B. Kumar Senior Advocate for Mr.R. Loganathan

For Respondents 2-5 in OSA and Cross Objectors : Mr.A. Venkatesan

Respondent -1 : Died

J U D G M E N T

P.K. MISRA, J

The present appeal is directed against the judgment dated 5.6.2000 in C.S.No.363 of 1995.

2. The plaintiffs are the appellants.

3. One Kandaswamy Naicker, who died in the year 1955, had three sons, namely, Murugesan, Venkatachalam and K. Veeraraghavan (Defendant No.1). One Meenakshi Ammal was the wife of Veeraraghavan. Three daughters of Meenakshi Ammal and Veeraraghavan are the plaintiffs and the four sons are the defendants 2 to 5 respectively. After the death of Kandaswamy Naicker there was a partition, wherein Murugesan separated himself and the other two brothers continued jointly. On 17.7.1971, the first defendant executed a release deed (Ex.B-3) in favour of his wife Meenakshi Ammal as well as all the children, including the plaintiffs, releasing his share in the joint family properties. Subsequently, under Ex.B-2 dated 27.12.1971, there was a partition between Venkatachalam and the family members of Veeraraghavan. The property described in 'B' schedule of such document was allotted to the family members of Veeraraghavan. Subsequently there was a partition under a registered deed of partition dated 23.4.1976, whereunder different properties as described in Schedule 'A' to 'H' were allotted to different parties, namely, the plaintiffs, defendants 2 to 5 and Meenakshi Ammal. As Veeraraghavan, the first defendant, had already released his interest, no property had been allotted to him. The property described in Item No.1 of Schedule 'A' of the plaint had been allotted to the share of Meenakshi Ammal and the property described in item No.2 of Schedule 'A' had not been specifically partitioned and, as per the recital, such property would be partitioned at the appropriate time according to the wish of Meenakshi Ammal. The properties which were inherited by Meenakshi Ammal from her mother Sivagami Ammal have been described in 'B' schedule of the plaint. Meenakshi Ammal died on 30.3.1982 intestate leaving behind the plaintiffs and the defendants as her heirs. Subsequently, the defendants 2 to 5 purported to divide 'A'

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schedule property as if the entire property belonged to them. The plaintiffs claim that they are entitled to separate share in 'A' and 'B' schedule properties. The second item in 'A' schedule consists of a Kalyana Mandapam constructed out of income of the family property and the plaintiffs are also entitled to a share in the building as well as in the income derived from the Kalayana Mandapam and they are entitled to past mesne profits. Accordingly, the suit for partition was filed claiming 3/8th share in the second item of Schedule 'A' and the entire 'B' schedule property and claiming 3/7th share in item No.1 of Schedule 'A'. They have also claimed past and future mesne profits.

4. A joint written statement was filed by the defendants 1 to 5. While not disputing about the relationship, the defendants claim that the plaint 'A' schedule items 1 & 2 are joint family properties belonging to the defendants alone and the plaintiffs not being the coparceners, do not have any right in such properties. The defendants admitted that 'B' schedule property had been inherited by Meenakshi Ammal from her mother. However, it was stated that item No.2 of 'B' schedule had been sold and documents had been signed by the plaintiffs as well as the defendants. The deed of release did not affect the right of the first defendant to get his share in the admitted joint family properties and at any rate it did not affect the right of other coparceners and such release deed is invalid in law and did not confer any right upon the plaintiffs and, in spite of such deed of release, the first defendant was enjoying his share in the properties. It has been further indicated in the written statement that the first defendant had only 1/5th share in the joint family property and even assuming that the deed of release is valid, the plaintiffs can have only 1/7th share each out of 1/5th share of the first defendant. It has been also indicated that in respect of Kalyana Mandapam the plaintiffs cannot claim any share as such property was a joint family property built out of income from the joint family property.

5. A reply statement was filed by the plaintiffs reiterating the claim made in the plaint.

6. On the basis of the pleadings, the learned single Judge framed the following issues :-

> "(1) Whether the plaintiffs are entitled to 3/7th share in item No.1 of 'A' schedule property and 3/8th share in item No.2 of 'A schedule property ?
>
> (2) Is the release deed dated 17.7.1971 executed by the first defendant is valid and if so to what share the plaintiffs are entitled ?
>
> (3) Whether the partition deed dated 23.4.1976 would convey any right on the mother to the properties allotted to

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her in the said partition ?

(4) Whether Kalyana Mandapam in item No.2 of 'A schedule property is available for partition ?

(5) Whether item No.2 in 'B' schedule property is available for partition ?

(6) To what properties the plaintiffs are entitled ?

(7) To what other reliefs the plaintiffs are entitled ?"

7. Under issue No.5, the learned single Judge held that item No.2 in 'B' schedule property was not available for partition as the said property had already been sold away much prior to the suit. The learned single Judge, however, held that the plaintiffs are entitled to 3/8th share in item No.1 of 'B' Schedule.

8. Such finding is not in dispute. However, since the first defendant has died during pendency of th appeal, it is obvious that the first defendant's 1/8th share in item No.1 of 'B' schedule property is to be apportioned among the plaintiffs and the remaining defendants 2 to 5.

9. The main discussion relates to issue No.2. While discussing the said issue, the learned single Judge held that after partition under Ex.B-1, Venkatachalam and Veeraraghavan continued to be the members of the joint family along with their children and their enjoyment was common. The first defendant executed Ex.B-3 release deed dated 17.7.1971 relinquishing all his rights in the joint family properties in respect of undivided 1/5th share in favour of other members of the joint family, including the wife and daughters. The learned single Judge further held:

> "... So the defendants are perfectly justified and correct in stating that under Ex.B.3 release deed the Plaintiffs have become entitled to only 3/7th of 1/5th share. ... the plaintiffs 1 to 3 by virtue of this release can only claim right, title and possession of 1/35 share each i.e., 1/7th of 1/5th".

Learned single Judge has negatived the contention of the defendants that Ex.B-3 release deed was only a nominal document as on the basis of such deed of release subsequent partition was effected between Venkatachalam on the one hand and the family members of Veeraraghavan on the other hand, wherein Veeraraghavan was excluded and properties were allotted to Meenakshi Ammal and other children. Subsequently as per the deed of partition Ex.A-2, the properties were partitioned among the plaintiffs, the defendants 2 to 5 and Meenakshi Ammal and no property had been allotted to the first defendant. It has been further found that after the deed of release, three daughters and Meenakshi Ammal were entitled to joint family properties and on that basis in the partition separate properties were allotted to the

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daughters and mother as well as four sons as per schedule 'A' to 'H' of such partition deed dated 23.4.1976. 'A' schedule of the partition deed Ex.A-2 is item No.2 of the present plaint 'A' schedule. Such property had been allotted to Meenakshi Ammal. Item No.1 of the present 'A' schedule is the property which had been left joint and which was under the enjoyment of Meenakshi Ammal. A Kalyana Mandapam was erected on the property described in item No.2 of plaint 'A' schedule. Such construction commenced during the lifetime of Meenakshi Ammal by utilising the income from the family property which was under her possession and subsequently it was completed in 1983, after the death of Meenakshi Ammal, and for completing the building the sons did not contribute individually from their separate share, but money was spent from the income of item No.1 of 'A' schedule. On the basis of the aforesaid conclusion, the learned single Judge held that the plaintiffs as well as the defendants are entitled to equal share in Kalyana Mandapam, namely, item No.2 of plaint 'A' schedule. So far as item No.1 of 'A' schedule is concerned, the learned single Judge held that originally such property was a joint family property, wherein the first defendant has merely released his share and, therefore, the plaintiffs would be entitled to 1/7th share out of 1/5th share of the first defendant.

10. The present appeal is confined to the extent of share in item No.1 of 'A' schedule property. The appellants also claim past mesne profits.

11. A cross objection has been filed on behalf of the defendants claiming that the plaintiffs are not entitled to any share whatsoever in 'A' schedule properties.

12. The learned Senior Counsel appearing for the appellants has submitted that as per the deed of release, all the family members including the plaintiffs became joint owners in respect of item No.1 of 'A' schedule property and as such they are entitled to get equal share. It is further contended that in the deed of partition, properties had been allotted to all and only item No.1 of 'A' schedule had been left out and since the extent of share has not been specifically delineated, the trial court should have allotted equal share to all the parties. In the alternative it is submitted that even assuming that the plaintiffs are entitled to get share only in respect of 1/5th interest of the original first defendant, so far as the third plaintiff is concerned, she being unmarried in 1989, when the Hindu Succession Act (Tamil Nadu Amendment) Act, 1989 came into force, such unmarried daughter should be treated as a coparcener along with other sons, namely, the defendants 2 to 5, and, therefore, she is entitled to a share equal to any other son, namely, the defendants 2 to 5. So far as the past mesne profits is concerned, the learned Senior Counsel has submitted that since the plaintiffs are entitled to

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their share in item No.2 of schedule 'A', Kalyana Mandapam as well as other properties, the defendants should be made liable to pay the mesne profits.

13. It is no doubt true that the deed of release is found to be genuine and acted upon. However, such deed of release or deed of relinquishment was operative in respect of the interest of the first defendant in the joint family properties. Obviously the first defendant had no power to execute any deed of release or relinquishment in respect of the interest of the other coparceners, namely, the defendants 2 to 5. Therefore, it has been rightly held by the trial court that by virtue of such deed of release, 1/5th share of the first defendant became vested with other members of the family, including the plaintiffs. On the basis of such deed of release, the properties had been divided among all the members of the joint family excluding the first defendant. Such partition is not sought to be reopened by any of the parties. Item No.1 of schedule 'A' is one joint family property which had not been partitioned in the deed of partition. The defendants 2 to 5 had 4/5th interest in such property and the balance 1/5th interest in such property representing the interest of the first defendant got settled with all the members, i.e., Meenakshi Ammal as well as four sons and three daughters. Since admittedly Meenakshi Ammal died subsequently in 1982, her interest in such property devolved upon all the heirs, namely, the plaintiffs and the defendants in equal proportion. Since admittedly the father, first defendant, had died in the meantime, the ultimate direction of the trial court that the plaintiffs had 3/35th share in item No.1 of schedule 'A' requires no modification.

14. However, so far as the third plaintiff is concerned, the contention of the learned Senior Counsel for the appellants that she should be taken to be a coparcener and, therefore, entitled to a share equal to that of a son has to be accepted. There is no dispute that by the time the amendment came into force, the third plaintiff was unmarried. By virtue of the amendment, she must be taken to be a coparcener.

15. Section 29-A of the Hindu Succession Act, a part of Chapter II-A, was inserted by Tamil Nadu Amendment Act 1 of 1990 with effect from 25.3.1989. As per Section 29-A(i), the daughter of a coparcener shall become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she had been a son and shall be subject to the same liabilities and disabilities in respect thereto as the son. As per Section 29-A (ii), the daughter shall be entitled to the same share as allottable to a son. However, as per Section 29-A(iv), nothing in Chapter II-A shall apply to a daughter married before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989.

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16. The Tamil Nadu Amendment Act came into force with effect from 25.3.1989. The plaintiffs 1 and 2 were admittedly married before such date but the third plaintiff was unmarried on the said date. The moot question is therefore whether the third plaintiff is entitled to the benefit as envisaged under Section 29-A. It is to be noted that in the plaint itself no such claim had been made regarding the alleged right of the third plaintiff under Section 29-A. However, a question of law raised in appeal on the basis of materials on record, if there is no factual aspect depending upon any new evidence to be adduced, is required to be gone into.

17. Section 29-A(v) provides that nothing in clause (ii) shall apply to a partition which had been effected before the date of commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989. It is now well settled that the expression "partition" in the context of the above provisions means a completed partition by metes and bounds and not mere severance of joint status.

18. In the above view of the matter, the contention of the learned Senior Counsel appearing for the plaintiffs / appellants is required to be accepted so far as Plaintiff No.3 is concerned inasmuch as she became a coparcener along with her father and brothers and continued to be so till the death of her father. On the death of Defendant No.1, the father of the plaintiffs 1 to 3 and defendants 2 to 5, his 1/5th interest in item No.1 of plaint 'A' schedule property would devolve in accordance with Section 6 of the Hindu Succession Act. It must be taken that Defendant No.1 was a coparcener in respect of such 1/5th interest along with his four sons and youngest daughter. Such 1/6th interest is to be inherited by three daughters and four sons and thus it is apparent that Plaintiff Nos.1 and 2 has 1/42 share each in such property, whereas four sons and the youngest daughter, who had become major by virtue of the amendment, each has 4/21 share in such property. The judgment and decree of the trial court relating to the share of the plaintiffs and the defendants 2 to 5 in Item No.1 of the plaint 'A' schedule property is thus liable to be modified and it is hereby declared that Plaintiffs 1 and 2 each has got 1/42 share and Plaintiff No.3 has got 4/21 share and similarly the Defendants 2 to 5 each has got 4/21 share.

19. The contesting respondents in their cross objection have raised the contention that the daughters, who had no right in the coparcenary property, cannot claim any share on the basis of the deed of release/relinquishment executed by the father – Defendant No.1. According to the learned Counsel appearing for the respondents a deed of relinquishment or a deed of release by a coparcener can be valid only if such relinquishment is in favour of other coparceners as no member of the coparcenary can otherwise gift his interest in the coparcenary. Even though a coparcener cannot gift his property to a stranger, gift by a coparcener to a small extent in favour of the

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daughters or other members of the joint family has been recognised. Moreover, whatever might have been the legal impact of the deed of release/relinquishment in favour of all the members of the joint family, including the daughters, such relinquishment has been accepted by all the parties concerned including the four sons in the subsequent deed of partition, admittedly executed and acted upon in the year 1976. Therefore, it is too late in the day for the sons to contend that the daughters could not claim any right by virtue of the deed of relinquishment. Therefore, the main contention raised in the cross objection to the effect that no share should have been allotted to the daughters in respect of the property released/relinquished by the father cannot be accepted.

20. In course of hearing, a contention had been raised by the learned Senior Counsel for the appellants that since the daughters are to get the property by virtue of the deed of relinquishment/release and it is not indicated therein that they are to get right in the interest of the father, the learned single Judge should have granted them share in equal proportion in respect of the entire property and should not have confined it to 1/5th interest of the father.

21. In our considered opinion, this submission cannot be accepted. At the time when the father executed he deed of relinquishment/release, he could have dealt with only his interest in the coparcenary and obviously he could not have released the interest of other coparcners, namely, the four sons. Therefore, the learned single Judge was correct in confining the right of the daughters to claim partition in respect of 1/5th interest of the father in the property relinquished/released by the father.

22. The next question relates to mesne profits. In normal course, the claim for mesne profits for a period of three years prior to filing of the suit would have been accepted. The respondents, however, have raised a question that since the first defendant was in possession of the property, mesne profits can be claimed only from the first defendant during his life time.

23. It is the admitted case of the parties that the Defendant No.1 had executed the deed of relinquishment. However, in the evidence of of D.W.1, the fourth defendant, there is no whisper that Defendant No.1 remained in possession. Similarly, no suggestion has been made to P.W.1., the Plaintiff No.1, who has given evidence that her brothers were in possession and the plaintiffs were not in possession, that possession was actually with Defendant No.1. Therefore, there is no reason as to why the mesne profits should not be paid to the plaintiffs for the period three years prior to the suit, during pendency of the suit and thereafter. However, in the absence of any evidence relating to

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income and expenditure of the properties, the question of ascertainment of mesne profits should be left to be done during the final decree proceedings.

24. For the aforesaid reasons, the appeal is allowed in part and the judgment and decree of the learned single Judge is modified. In modification of the judgment and decree of the trial court it is declared that Plaintiff Nos.1 and 2 each is entitled to 1/42 share in Item No.1 of Plaint 'A' schedule property and Plaintiff No.3 is entitled to 4/21 share in such property and Defendants 2 to 5 are entitled to each 4/21 share in such property. The plaintiffs are also entitled to mesne profits so far as the Kalyana Mandapam is concerned. The cross objection is rejected. There shall be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Sub Assistant Registrar,
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